

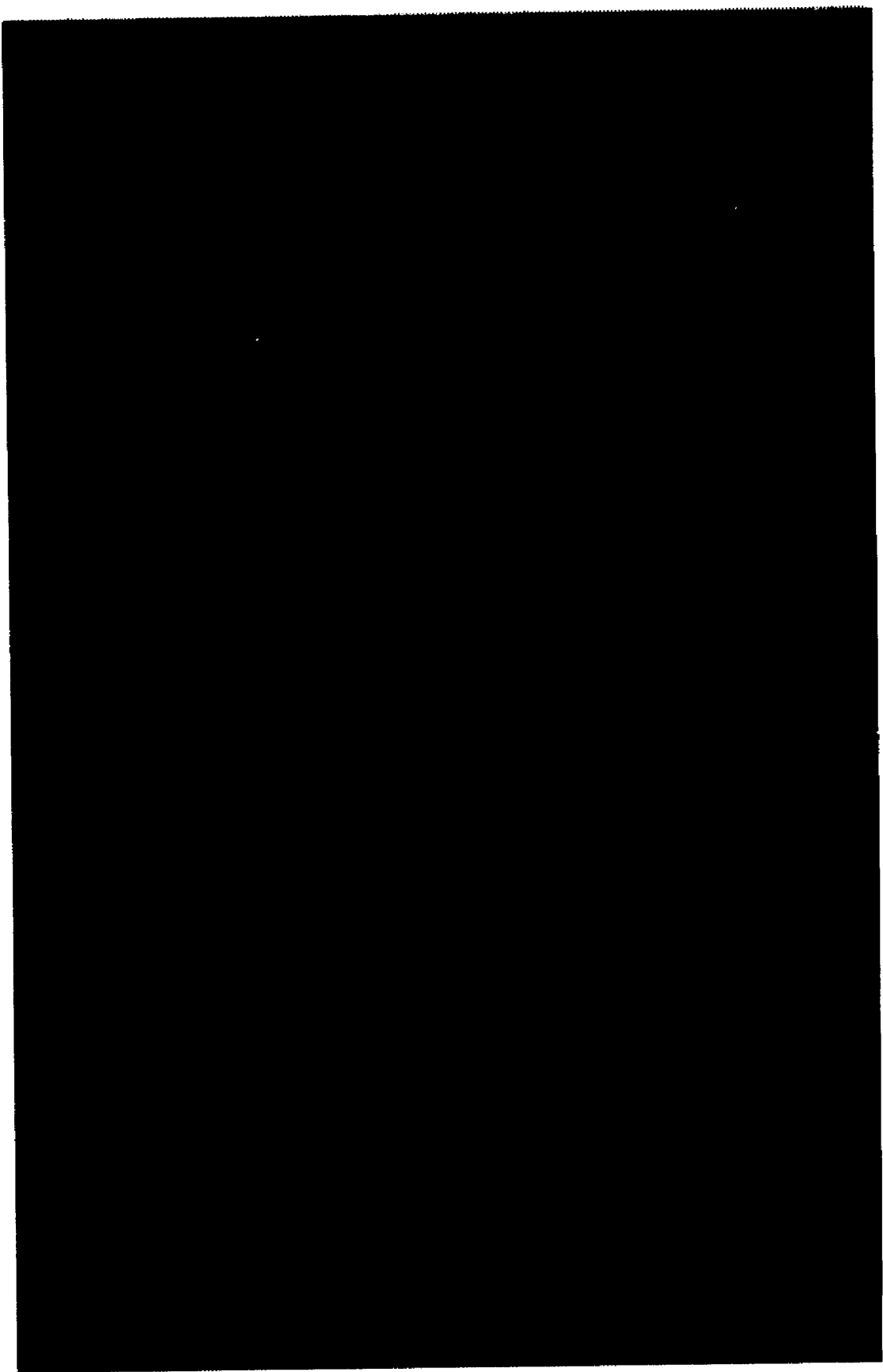
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UNITED STATES GENERAL ACCOUNTING OFFICE

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November 1985

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GENERAL GOVERNMENT MATTERS

PROPERTY

B-218982 Nov. 1, 1985

Private

Taking for Government Use

Liability of United States

On request for reconsideration, we affirm Z-2854316, Jan. 29, 1985, in which we denied a claim for \$175,000 since the record still presents a substantial question about whether a taking of real property by the United States has occurred due to road closings resulting from a Federal construction project.

**HOUSING AND URBAN DEVELOPMENT
DEPARTMENT**

B-201669 Nov. 26, 1985

Mortgage Insurance Funds

Distributive Shares

Unrefunded distributive share is held by Department of Housing and Urban Development (HUD) in Mutual Mortgage Insurance Fund as trustee on behalf of persons entitled thereto. If HUD cannot locate persons in order to make payment, amounts should be cleared from the Fund's account and transferred to the credit of the Treasury account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" in accordance with procedures set forth in Treasury Department Fiscal Requirements Manual for Guidance of Federal Agencies Vol. I, Part 6, Chapter 3000. Statutes of Limitations generally do not run against claims by beneficiaries for amounts held by the Government as trustee in the trust account for "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." B-103575, August 27, 1951. Failure to transfer unpaid distributive shares in manner specified does not serve to render the trust amounts subject to statutes of limitations.

OFFICERS AND EMPLOYEES
Health Insurance
Blue Cross-Blue Shield
Funds

B-219236.2 Nov. 26, 1985

GAO and Department of Justice approved Office of Personnel Management's proposal to accept premium refund from Blue Cross/Blue Shield in the Federal Employee Health Benefits Fund's Contingency Reserve. B-219136, July 31, 1985 and 5 U.S.C. § 8909 (1982). OPM now proposes that, when employee refund checks are drawn on the Contingency Reserve account, the Government's share of the returned premiums be deposited in the Treasury's General Fund. This plan would effect a net savings to the Government, but would violate the Contingency Reserve statute, which permits the reserve fund to be used only to defray rate increases, lower premium contributions or increase benefits. Legislative history shows that refunds of this type were planned for in the original statute, although they were thought to be unlikely to occur. Deposit in the General Fund would also violate 31 U.S.C. § 1532 prohibiting transfers between appropriation accounts.

ACCOUNTABLE OFFICERS
Relief
Debt Collection

B-220836 Nov. 29, 1985

The General Accounting Office will deny relief under the diligent claims collection standard of 31 U.S.C. § 3527(c) in cases involving Treasury debit vouchers dated after January 15, 1985, if Army's designated collection representative does not begin collection action within 3 months from the time notice of a loss is received.

PERSONNEL LAW: CIVILIAN PERSONNEL

RETIREMENT

B-219931 Nov. 5, 1985

Civilian

Reemployed Annuitants

Annuity Deduction

Validity

Administrative Office of the United States Courts questions whether retirement benefits authorized by 28 U.S.C. §§ 611, 627, and 677 for certain officials of the judicial branch may be paid to an eligible official who accepts post-retirement employment in government service. The Administrative Office is advised that full retirement benefits may be paid to such an official because nothing in the applicable legislation requires suspension or reduction of annuity payments in the event of the annuitant's reemployment. Furthermore, we have no legal objections if a reemployed annuitant wishes to temporarily waive the retirement benefits payable to him under 28 U.S.C. §§ 611, 627, or 677, during the period of reemployment.

OFFICERS AND EMPLOYEES

B-219470 Nov. 8, 1985

Promotions

Temporary

Detailed Employees

Higher Grade Duties Assignment

Wilson Case

An employee who claims entitlement to a retroactive temporary promotion and backpay based on our Turner-Caldwell decisions, appeals a disallowance by our Claims Group. That disallowance was based on our decision Turner-Caldwell III, 61 Comp. Gen. 408 (1982), which followed the Court of Claims decision in Wilson v. United States, 229 Ct. Cl. 510 (1981), denying such entitlement, and stated that it would apply to all pending and future claims. The employee argues that, since our decision postdated the events on which his claim is based, it should not govern his entitlement. The disallowance is sustained. Since the employee's claim was not settled prior to our Turner-Caldwell III decision, that decision governs.

Decisions

Reconsideration

Error of Law or Fact Basis

Not Established

In order to obtain a reversal of a prior decision, a material mistake of law or fact must be proven. The claimant has raised no new arguments in support of his claim for real estate expenses that were not considered in the prior decision. Mere disagreement with the previous decision is not a proper basis for reversal of a decision upon reconsideration.

OFFICERS AND EMPLOYEES

Transfers

Government v. Employee Interest

Relocation Expense Reimbursement

Administrative Determination

Finality

A former Internal Revenue Service employee seeks reconsideration of his claim for real estate expenses. Our decision of January 3, 1985, denied his claim because the employee requested the transfer for personal reasons. Since the agency determination that the transfer was not in the interest of the Government is in accordance with decisions of this Office, and the employee failed to complete 1 year of service following the transfer, the prior decision is reaffirmed.

TRANSPORTATION
Household Effects
What Constitutes

B-216938 Con't
Nov. 12, 1985

An Internal Revenue Service employee was transferred from Indianapolis, Indiana, to Fairbanks, Alaska. After completion of a 2-year service period specified in the service agreement, the employee requested a transfer to Portland, Maine, for personal reasons. The service did not authorize relocation expenses and the employee disposed of most of his household effects before departing Fairbanks. He is claiming an amount equal to the cost of transporting his household effects to Alaska. The claim may not be paid since the law and regulations provide for reimbursement on the basis of the weight of the household effects actually transported.

OFFICERS AND EMPLOYEES
Transfers
Real Estate Expenses
Loan Discount Fees

B-218946 Nov. 12, 1985

A transferred employee who purchased a new residence paid a 1-1/2 percent loan fee and reimbursed the seller for an additional fee of 1-1/4 percent. Although the employee claimed both fees as "loan origination fees," the agency allowed only the 1-1/2 percent fee as an origination fee and denied reimbursement for the additional 1-1/4 percent. We sustain the agency's determination that the additional 1-1/4 percent fee must be disallowed, because the record shows that the fee constitutes a nonreimbursable loan discount.

OFFICERS AND EMPLOYEES**B-217514 Nov. 25, 1985****Transfers****Real Estate Expenses****Broker's Fees****Legal Obligation to Pay Requirement**

An employee, incident to a change of official duty station, sold his residence in California to a purchaser who was a licensed real estate broker. The broker's commission, as provided in the contract of sale, was deducted from the selling price. The provision in the contract of sale for payment of a commission failed to satisfy the requirements of the California statute of frauds since it did not show the fact of employment of the broker by the seller. The payment of the commission, therefore, was not a legally enforceable obligation and the employee may not be reimbursed for the commission.

OFFICERS AND EMPLOYEES**B-219076; B-219123****Transfers****Nov. 25, 1985****Real Estate Expenses****Loan Origination Fee**

Two transferred employees who incurred loan origination fees of 1.5 percent are not entitled to reimbursement for more than 1 percent fee allowed by the Veterans Administration. Survey of lending institutions in the Lexington, Kentucky area indicating that 73 percent charge loan origination fees equal to 1 percent of the loan amount confirms the Veterans Administration's determination that 1 percent is the customary loan origination fee.

LEAVES OF ABSENCE**B-217937 Nov. 26, 1985****Compensatory Time****Credit Hours****Limitation on Accrual****Effect****Overtime Adjustment**

An employee who failed to use compensatory time off before the time limit fixed by his agency claims overtime pay. Compensatory time remaining to the credit of an employee after the time limit may not be converted back to overtime unless agency determines that failure to take compensatory time was for reasons beyond employee's control due to exigencies of the service.

LEAVES OF ABSENCE**B-218763 Nov. 26, 1985****Civilians on Military Duty****Unlimited Military Leave****Purpose of Duty Consideration****District of Columbia National Guard Duty**

A former employee of the Government Printing Office and member of the District of Columbia National Guard seeks recredit of 2 days annual leave charged when military leave was denied. Military leave was denied because the employee had used his 15-day annual allotment of military leave under 5 U.S.C. § 6323(a) during annual training. The employee, as a member of D.C. National Guard, was also eligible to take military leave for annual training under 5 U.S.C. § 6323(c), which is not subject to the 15-day ceiling. In view of this, subsection 6323(c) leave may be substituted for subsection 6323(a) leave for annual training in order to provide military leave to cover the time he was charged annual leave.

FEES**B-218964 Nov. 26, 1985****License, Permit, etc. Fees
Prohibition**

Employees with the National Park Service, who operate heavy duty trucks in the performance of their duties as tree maintenance workers, may not be reimbursed for payment of fees for state licenses required to operate the vehicles. These fees are personal expenses incurred by the employees to qualify for their Government employment.

FRAUD**B-219051 Nov. 27, 1985****False Claims
Subsistence Expenses**

Agency recouped subsistence expenses advanced to an employee, determining that he had fraudulently claimed payment of tips to hotel maids on each day of a 19-day temporary duty assignment. Based on evidence in the record, we conclude that the agency has sustained its burden of establishing that the employee fraudulently claimed payment of maid tips. Accordingly, the employee may not recover any of the subsistence expenses recouped from him.

TRANSPORTATION**B-217095 Nov. 29, 1985****Household Effects
Weight Limitation
Changes
Retroactive**

An employee is limited to the maximum weight for shipment of household goods provided in the regulations in effect on the date of his transfer, November 14, 1982, rather than the maximum weight allowed at the time of his household goods shipment, on December 21, 1983. The regulations implementing the increases authorized by section 118 of Public Law 98-151, November 14, 1983, restrict these increases to employees reporting to their new duty station on or after November 14, 1983. Contrary statements made by congressional sponsors after enactment are not sufficient to show that the implementing regulations are improper. See Jack G. Petrie, B-216542, June 11, 1985.

OFFICERS AND EMPLOYEES**B-219026 Nov. 29, 1985****Transfers****Real Estate Expenses****Loan Origination Fee**

A transferred employee purchased a new residence and was charged 2.25 percent of her loan as a "loan origination fee." She was reimbursed 1 percent and now claims the remaining 1.25 percent. Under Federal Travel Regulations (FTR) para. 2-6.2d(1)(b), such fees are reimbursable not to exceed amounts customarily charged in the area for similar transactions. Since HUD advised that the customary range of loan origination fees charged in the area is 2-3 percent of the loan, the employee may be reimbursed the additional amount claimed.

LEAVES OF ABSENCE**B-219505 Nov. 29, 1985****Annual****Leave Adjustment****Excess Leave Credited****Administrative Error**

Where an employee's annual leave account was over-credited due to an error in calculating his service computation date, the employee may be granted waiver only to the extent reconstruction of his leave account results in a negative leave balance. The 123 hours deducted in reconstructing his annual leave account may not be waived or otherwise reccredited. When an employee has sufficient leave to his credit to cover the adjustment there is no overpayment of pay which may be considered for waiver.

Transfers**Nonreimbursable Expenses****Operating and Maintenance Expenses****Residence**

The cost of removing a damaged tree from the site of a transferred employee's former residence is a cost of maintenance that cannot be reimbursed, either as a real estate expense or as a part of the miscellaneous expenses allowance. For the same reason the cost of replacing a washer in a shut-off valve may not be reimbursed even though the need for repair became apparent only after the employee's washing machine had been disconnected from the supply line in his former residence.

The cost of locks, lock cylinders and the services of a locksmith to upgrade the security of a transferred employee's new residence may not be reimbursed as a part of the miscellaneous expenses allowance. Even though the former owner could not account for all keys to the existing locks, the changes or additions can only be characterized as repairs or improvements that must be disallowed under FTR para. 2-3.1c(13).

TRAVEL EXPENSES**Transfers****Dependents****Unaccompanied Travel**

Employee claims reimbursement for round-trip travel of his wife to attend settlement on residence at the new duty station. Claim may not be paid as neither statute nor regulation authorizes this expense and FTR para. 2-3.1c(11) precludes reimbursement of travel and transportation expenses in excess of those specifically authorized.

PERSONNEL LAW: MILITARY PERSONNEL

DEBT COLLECTIONS

B-220792 Nov. 14, 1985

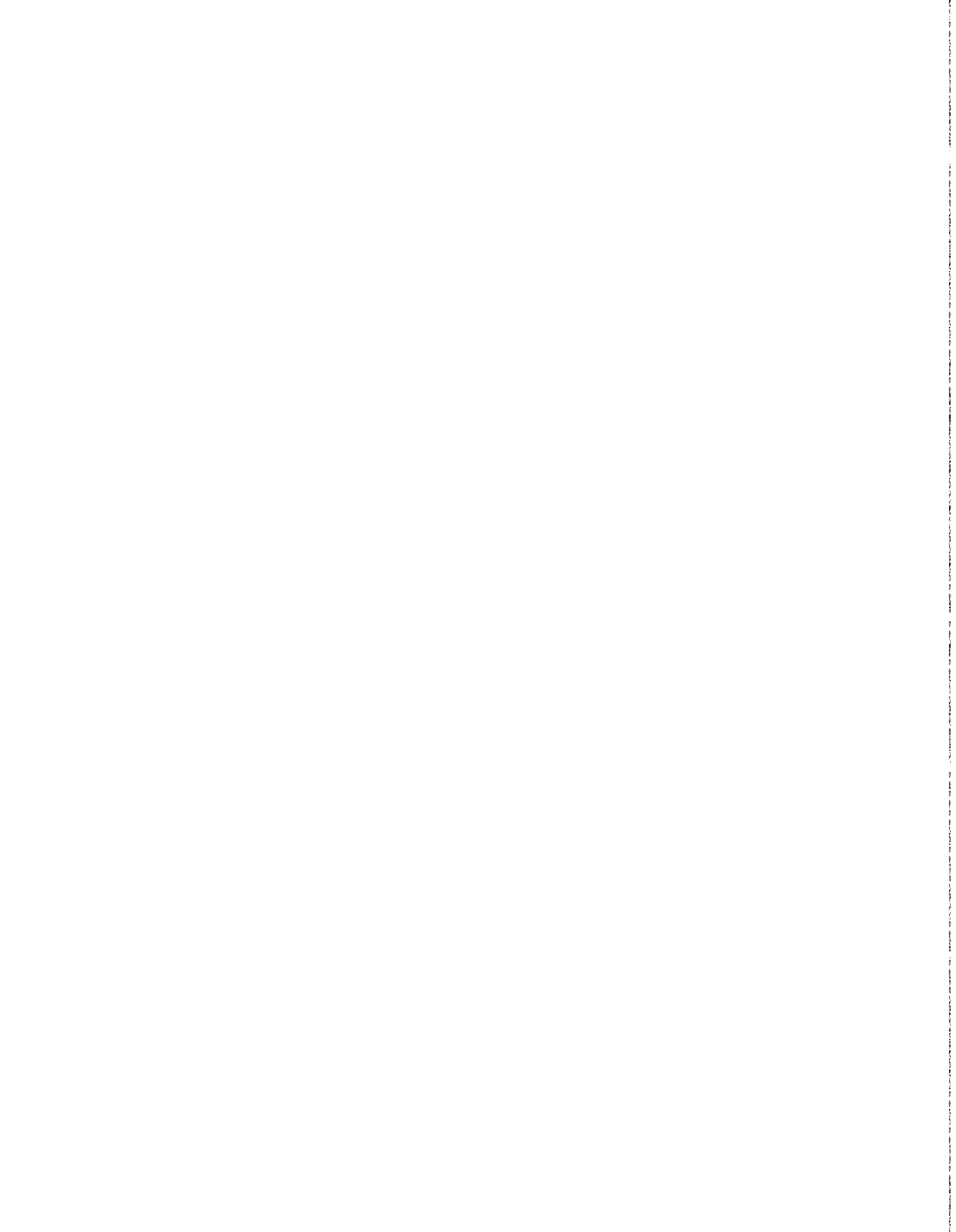
Waiver

Military Personnel

Allowances

Basic Allowance for Quarters (BAQ)

A Navy petty officer's request for waiver of his debt to the United States arising out of overpayments of a military basic allowance for quarters and a variable housing allowance is denied, where it appeared that he knew or strongly suspected he was being overpaid. Under the governing provisions of statutory law, waiver of overpayments of military pay and allowances is not allowed if the service member knew or should have known he was being overpaid and consequently, in this case, there is no basis for waiving collection of the overpayments.



PROCUREMENT LAW

BIDDERS

B-218852 Nov. 1, 1985

Debarment

Labor Stipulation Violations

Davis-Bacon Act

Debarment Unwarranted

The Department of Labor stated that, in view of the circumstances, it was taking no further action (i.e., debarment) against a contractor for violations of the Davis-Bacon Act. Based on our independent review of the record, we conclude that the contractor underpaid the employees, but the record does not contain sufficient evidence of willful violations of the labor standards provisions of the Act to warrant debarment. Rather, we find that the underpayments may have resulted from careless recordkeeping and a misunderstanding of the wage decision's requirements concerning fringe benefits and classification of workers. Therefore, the contractor will not be debarred under the Act.

CONTRACTS

B-219458 Nov. 1, 1985

Protests

85-2 CPD 501

Preparation

Costs

Noncompensable

Recovery of quotation preparation expenses and the cost of filing and pursuing the protest is denied where a protest is found without merit. Recovery of lost profits is not permitted under any circumstances.

PURCHASES

Small

Awards

Propriety

Misplacement of Lower Offer

GAO will not disturb a small purchase contract where after award the contracting agency discovers that protester's timely lower quotation had been misplaced since agency's error was not the result of a conscious or deliberate effort to exclude the protester from consideration.

BIDS
Opening
Postponement
Denied

B-219512 Nov. 1, 1985
85-2 CPD 502

Failure to extend bid opening date was not improper where protester was given adequate time to submit competitive bid and where adequate competition and reasonable prices were obtained and protester does not allege that any contracting agency action was deliberately intended to preclude protester from competing on procurement.

CONTRACTS

Protests

General Accounting Office Procedures
Filing Protest With Agency

When protest is initially filed with the contracting agency before bid opening, bid opening in the face of protester's objections constitutes initial adverse agency action, and protest to GAO must be filed within 10 working days thereafter.

CONTRACTS

Protests

Procurement Pending Requirement

GAO will consider only protests involving specific procurement action and will dismiss allegations of past improprieties.

BIDS**B-219635 Nov. 1, 1985****Invitation for Bids****85-2 CPD 503****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

Protest alleging that agency has no rational basis for changing the weight limitation for high pressure portable compressors from 140 pounds to 210 pounds is denied since agency determination of its needs will not be disturbed absent clear evidence that the agency's decision is arbitrary or unreasonable and agency provides reasonable explanation for its determination.

BIDS**Opening****Postponement****Denied**

Protest against agency's refusal to extend bid opening date is denied where agency obtained adequate competition and reasonable prices and protester does not allege that the agency deliberately attempted to preclude the protester from submitting a bid.

CONTRACTS**B-220015 Nov. 1, 1985****Negotiation****85-2 CPD 505****Awards****Initial Proposal Basis****Propriety**

An award based on initial proposals, without holding discussions, is proper where the solicitation advised offerors of the possibility and there was adequate competition to demonstrate that award would result in a fair and reasonable price.

CONTRACTS**B-220015 Con't****Negotiation****Nov. 1, 1985****Late Proposals and Quotations****Modification of Proposals****Price Reduction**

Contracting agency's decision not to open negotiations after receiving a late price reduction from one offeror--and to proceed with an award based on initial proposals--is reasonable where the expenses of conducting preaward surveys on the intended awardee and its subcontractor already have been incurred and thus will diminish the potential cost saving, and the firm offering the late reduction did so 2 months after the initial closing date, only, it appears, after determining from the preaward survey activity the identity of the intended awardee, so that the firm thus would enjoy a competitive advantage not contemplated by the normal procurement process if negotiations were held.

BIDS**B-220380 Nov. 1, 1985****Responsiveness****85-2 CPD 506****Determination****On Basis of Bid as Submitted at Bid Opening**

Bid on total small business set-aside rejected as nonresponsive because bidder indicated that not all supplies to be furnished will be the product of a small business concern may not be cured or defect waived as a minor informality since responsiveness must be determined from material available at bid opening and postopening explanations cannot be considered to correct a nonresponsive bid.

BIDS **B-220380 Con't**
Responsiveness **Nov. 1, 1985**
Exception Taken to Invitation Terms
Small Business Requirements

Bid on total small business set-aside which indicates in the appropriate block that not all supplies to be furnished will be the product of a small business concern is not responsive and may not be considered for award because bidder would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside.

CONTRACTS **B-220400 Nov. 1, 1985**
Protests **85-2 CPD 507**
Authority to Consider
Activities not Involving Federal Procurement

To be subject to review by GAO under the Competition in Contracting Act of 1984, a protest must pertain to a procurement of property or services by a federal agency. A protest concerning a lease of government property therefore will not be considered, since a lease is a type of sale, not a procurement of property or services. Protests concerning sales will be reviewed by GAO only where the federal agency involved has agreed to such review.

CONTRACTS **B-220839 Nov. 1, 1985**
Negotiation **85-2 CPD 508**
"Buying In"
Not Proper Basis to Prevent Award

Protest alleging that awardee submitted below-cost offer is dismissed. There is no legal basis to object to a contract award solely because the awardee submitted a below-cost or "buy-in" offer.

BIDDERS**B-220857 Nov. 1, 1985****Qualifications****85-2 CPD 509****License Requirement****State, etc. Certifications**

Where solicitation does not impose a specific license requirement, agency may make award without regard to whether bidder is licensed under local law.

CONTRACTORS**Responsibility****Determination****Review by GAO**

Protest against awardee's ability to comply with solicitation requirements concerns matter of responsibility which GAO does not generally review.

LABOR DEPARTMENT**Jurisdiction****Service Contract Act Violations**

Responsibility for administration and enforcement of the Service Contract Act is vested in the Department of Labor, not GAO.

CONTRACTS**B-220891 Nov. 1, 1985****Protests****85-2 CPD 510****Basis for Protest Requirement**

Where protester alleges that it should have been awarded the contract but fails to take any exception with the agency's evaluation of proposals, protest is properly dismissed for failure to state a basis for protest.

CONTRACTS **B-220894 Nov. 1, 1985**
Protests **85-2 CPD 511**
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

Protest filed with GAO within 10 working days of agency's denial of protest is untimely because it pertains to alleged defect in invitation for bids and was not filed initially with the agency until after bid opening.

BIDDERS **B-218846 Nov. 4, 1985**
Debarment
Labor Stipulation Violations
Davis-Bacon Act
Wage Underpayments
Debarment Required

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had falsified certified payroll records and induced several of its employees to rebate substantial portions of their back wages. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and rebate inducement was intentional. Therefore, the subcontractor will be debarred under the Act.

BIDDERS**B-218861 Nov. 4, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records and forged employee receipts. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act.

CONTRACTS**B-219114.2 Nov. 4, 1985****Protests****85-2 CPD 515****General Accounting Office Procedures****Timeliness of Comments on Agency's Report**

Dismissal of original protest for failure to file written comments on the agency report within 7 working days of the due date for delivery of the report to GAO and to the protester is affirmed. Notwithstanding the protester's assertion that it received the report late, the protester failed in its duty to notify GAO that it had not received the report by the due date.

CONTRACTS**B-219327.6 Nov. 4, 1985****Protests****85-2 CPD 516****Contract Administration****Not for Resolution by GAO**

Whether the awardee actually performs the contract in accordance with the terms of the solicitation is a matter of contract administration which is not for GAO consideration.

B-219327.6 Con't

Nov. 4, 1985

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

**Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest alleging improprieties in an invitation for bids is untimely and will not be considered on the merits where the protest was not filed with GAO prior to bid opening.

B-219469 Nov. 4, 1985

85-2 CPD 517

Awards

Propriety

Technical Superiority--Paramount Consideration

Where the solicitation advises offerors that technical considerations are of paramount importance, acceptance of the highest technically rated proposal that offers 3,000 more hours of effort was reasonable notwithstanding protester's proposed lower cost.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Cost Realism Analysis

Reasonableness

Cost realism analysis is not subject to objection where the procuring agency's analysis indicates that an offeror's proposed costs compare favorably with the agency's estimate and are based on pay grades that relate most directly to the work described in the solicitation, and the protester has not shown that such an analysis is unreasonable.

CONTRACTS
Negotiation
Requests for Proposals
Amendment

B-219469 Con't
Nov. 4, 1985

Where amendment increases level of effort in solicitation, without correspondingly increasing the estimated number of staff hours, offeror reasonably was on notice that increased number of staff hours would be required. Furthermore, offeror was advised during discussions of concern that its staff hours were low.

CONTRACTS
Negotiation
Offers or Proposals
Evaluation
Administrative Discretion
Cost/Pricing Evaluation

B-219636 Nov. 4, 1985
85-2 CPD 518

GAO finds no basis to question the Army's evaluation of awardee's proposal concerning costs associated with awardee's performance schedule where Army adjusted upward awardee's performance costs to cover initial performance period which awardee failed to adequately cost.

CONTRACTS
Negotiation
Offers or Proposals
Evaluation
Personnel

Based on review of record, GAO cannot question the Army's position that there is no merit in the protester's allegations about the awardee's compliance with the RFP's staffing and manning requirements.

CONTRACTS**Protests****Allegations****Speculative**

B-219636 Con't

Nov. 4, 1985

GAO rejects as speculative protester's assertion that projected cost of "portal-to-portal" pay should be added to cost of awardee's proposal where protester is not currently obligated to pay "portal-to-portal" compensation to contract employees.

CONTRACTS**Protests****Conflict in Statements of Protester and Contracting Agency**

Contrary to protester's allegation, Army did consider possibility that awardee would be less than successful in recruiting the incumbent contractor's work force as awardee proposed and, consequently, made a cost adjustment to the protester's proposal.

CONTRACTS**Protests****General Accounting Office Function****Scope of Review of Agency Actions**

Protest that contracting agency refused to provide protester with access to certain documents for the development of its protest is denied. The contracting agency has the primary responsibility for determining which documents are subject to release under the Competition in Contracting Act of 1984, Pub. L. 98-369, § 2741(a), 98 Stat. 1175, 1199-1203.

FREEDOM OF INFORMATION ACT**Disclosure Requests****Records of Agencies, etc., Other Than GAO****Authority of GAO to Require Disclosure**

GAO has no authority under the Freedom of Information Act, 5 U.S.C. § 552 (1982), to determine what information agencies must disclose under the act.

CONTRACTS	B-219988.4 Nov. 4, 1985
Negotiation	85-2 CPD 519
Offers or Proposals	
Preparation	
Costs	
Denied	

Recovery of proposal preparation costs and the costs of pursuing a protest is inappropriate where the remedy afforded the protester is the opportunity to compete in the procurement.

CONTRACTS	B-220180 Nov. 4, 1985
Protests	85-2 CPD 520
General Accounting Office Procedures	
Timeliness of Protest	
Date Basis of Protest Made Known to Protester	

Protest based on agency's failure to provide sufficient information for the submission of a proposal is untimely where the protest is not filed within 10 days after the closing date.

Protest concerning the evaluation of the protester's equipment must be filed no later than 10 days after the basis of the protest is known or should have been known, whichever is earlier.

CONTRACTS	B-220390 Nov. 4, 1985
Protests	85-2 CPD 521
Interested Party Requirement	
Direct Interest Criterion	

Protester who did not bid is not an interested party under GAO's Bid Protest Regulations because protester's interest as a supplier to dealer who bid on IFB is too remote.

CONTRACTORS**Responsibility****Determination****Review by GAO****Affirmative Finding Accepted****B-220406 Nov. 4, 1985****85-2 CPD 522**

GAO will not review a challenge to a contracting agency's affirmative responsibility determination where there is no allegation or showing that the contracting officials acted fraudulently or in bad faith or that the solicitation contained definitive responsibility criteria that have not been met.

CONTRACTS**Protests****Basis for Protest Requirement**

Protester's disagreement with the contracting agency's evaluation of the relative merits of the protester's and the awardee's proposals is not a basis on which to challenge award of the contract where the protester does not contend that the agency improperly applied the evaluation criteria in the solicitation or otherwise violated applicable procurement laws or regulations.

CONTRACTS**Protests****Moot, Academic, etc. Questions****Contract Terminated for Convenience****B-220693 Nov. 4, 1985****85-2 CPD 523**

Protest is academic where the protester, the third-low offeror, argues that the awardee's equipment does not comply with specifications, but the contracting agency has terminated the award on other grounds and proposes to make award to the second-low offeror, whose ability to meet specifications the protester has not challenged.

CONTRACTS

B-218567.2 Nov. 5, 1985

Negotiation

85-2 CPD 524

Offers or Proposals**Best and Final****Additional Rounds**

There is nothing wrong with requesting more than one round of best and final offers where a valid reason exists to do so. Where an otherwise strong proposal needs some revision, reopening discussions to permit such revisions does not constitute technical leveling.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Technical Acceptability****Administrative Determination**

Contracting agency reasonably declined to find proposal technically unacceptable where the proposal offered personnel already committed to performing other contracts who could be made available with the agency's approval under the other contracts.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest that request for best and final offers, after the contracting agency disclosed the percentage cost differential between offers, constituted an auction is untimely where filed after the closing date for the receipt of best and final offers.

BIDDERS**B-218848 Nov. 5, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Unwarranted**

The Department of Labor stated that, in view of the circumstances, it did not consider further administrative action (i.e., debarment) necessary against a subcontractor for violations of the Davis-Bacon Act. Based on our independent review of the record, we conclude that the subcontractor underpaid employees, but the record does not contain sufficient evidence of intentional--as opposed to inadvertent--violation of the labor standards provisions of the Act to warrant debarment. Therefore, the subcontractor will not be debarred under the Act.

BIDDERS**B-218855 Nov. 5, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Unwarranted**

The Department of Labor stated that, in view of the circumstances, it was taking no further action (i.e., debarment) against a subcontractor for violations of the Davis-Bacon Act. Based on our independent review of the record, we conclude that the subcontractor underpaid the employees, but that the underpayments appear to be the result of inadvertence caused by ignorance or misunderstanding of the law on the part of the subcontractor and managerial difficulties of the subcontractor due to its President's major surgery and related mental strain. The record does not contain any evidence of willful violation of the Davis-Bacon Act. Therefore, the subcontractor will not be debarred under the Act.

BIDS**B-219648 Nov. 5, 1985****Responsiveness****85-2 CPD 525****Failure to Furnish Something Required****Information****Small Business Concerns****End Product Contributor**

Telegraphic bid for the supply of canned vegetables, submitted in response to total small business set-aside solicitation, which bid stated with reference to offered prices and delivery schedule "All above subj. to terms and conditions [of solicitation]. 100% American processed . . ." failed to unequivocally represent that bidder would furnish products produced by small business concern and, therefore, properly was rejected as nonresponsive.

CONTRACTS**B-219766 Nov. 5, 1985****Negotiation****85-2 CPD 526****Requests for Proposals****Specifications****Minimum Needs****Not Overstated**

Agency's specifications for sweepers with scrubber attachment and electromagnetic interference control are not unduly restrictive of competition where the agency presents a reasonable explanation for its minimum needs and the protester fails to show that the restrictions are unreasonable.

CONTRACTS**Negotiation****Requests for Proposals****Specifications****Restrictive****Conformability of Equipment, etc. Offered****Administrative Determination**

Solicitation requirement that offered equipment have Underwriters Laboratories Inc. seal of approval attached to each sweeper unit is unduly restrictive of competition and, therefore, improper.

CONTRACTS**B-220824 Nov. 5, 1985****Protests****85-2 CPD 527****Basis for Protest Requirement**

Protest is dismissed for failure to set forth a detailed statement of the legal and factual grounds of protest where the protester merely says that it submitted the best proposal and that the agency's evaluation was not fair and equitable, but provides no supporting details.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Debriefing Conferences****Issues Providing Protest Basis**

In light of the requirement of the Competition in Contracting Act of 1984 that an agency suspend performance of a contract if it receives notice of a protest within 10 days of the date of the contract award, GAO recommends that the Federal Acquisition Regulation be revised to require agencies to schedule post-award debriefings of unsuccessful offerors as soon after award as possible, so that if basis for protest exists, it can be learned in time to permit protester to have the benefit of suspension of performance requirement.

CONTRACTS**B-220935 Nov. 6, 1985****Small Business Concerns****Awards****Small Business Administration's Authority****Size Determination**

GAO will not consider a protest of a bidder's small business size status because the Small Business Administration has conclusive authority to determine size status.

GENERAL ACCOUNTING OFFICE B-220935 Con't
Jurisdiction Nov. 6, 1985
Conflict of Interest Statutes

Protest that award to a firm that employs a former officer of the United States Army will result in a violation of the Ethics in Government Act of 1978 (18 U.S.C. § 207) and is improper provides no basis for objection by GAO in the absence of any evidence suggesting that the former officer exerted any improper influence on the award.

CONTRACTS B-220968 Nov. 6, 1985
Small Business Concerns 85-2 CPD 528
Awards
Responsibility Determination
Nonresponsibility Finding
Review by GAO

GAO generally will not review a contracting officer's determination of nonresponsibility with respect to a small business bidder since by law the Small Business Administration is empowered to determine conclusively whether a small business firm is responsible.

BIDS B-219107.2 Nov. 7, 1985
Preparation 85-2 CPD 529
Costs
Noncompensable

Claim for bid preparation costs is denied where the protester was not in line for contract award because its bid exceeded the available funds for award.

BIDS**B-219107.2 Con't****Preparation****Nov. 7, 1985****Costs****Noncompensable****Protester not in Line for Award**

Claim for bid preparation costs filed by the second low bidder, in comments submitted as an interested party, is denied since it was the protester's utilization of the bid protest process that revealed the procurement deficiency in the case, and the second low bidder would not be in line for contract award in any event.

CONTRACTS**Protests****Preparation****Costs****Noncompensable**

Claim for the costs of filing and pursuing the protest, including attorney's fees, is granted where the protester has been prevented from having a fair opportunity to compete. It is apparent that if the agency had acted properly and promptly forwarded the protester's size status protest to the SBA, the solicitation would have been canceled and the requirement resolicited.

CONTRACTS**Small Business Concerns****Size Status****Protests****Mandatory Referral to Small Business
Administration**

When a size protest is filed with the contracting officer before award of a contract under a small business set-aside, he must promptly forward that protest to the Small Business Administration (SBA). The Federal Acquisition Regulation contains no exceptions to this requirement, and the fact that the contracting officer believes that the protest lacks sufficient evidence to be valid does not provide a reasonable basis for his failure to forward the protest promptly to SBA.

CONTRACTORS B-219449 Nov. 8, 1985
Responsibility 85-2 CPD 530
Administrative Determination
Nonresponsibility Finding
Supported by Record

Contracting agency reasonably determined that bidder was nonresponsible based on Department of Labor letter advising agency that the offeror underpaid employees under 11 contracts awarded over a recent 1-year period.

CONTRACTS
Protests
Burden of Proof
On Protester

Evidence does not prove agreement between contracting agency and Small Business Administration (SBA) to extend the stipulated time period for SBA to issue a certificate of competency (COC) where contracting agency merely did not object to SBA's advice that it was holding the matter in abeyance while attempting to obtain more information.

CONTRACTS
Small Business Concerns
Awards
Responsibility Determination
Nonresponsibility Finding
Review by GAO

Where the Small Business Administration does not act on a nonresponsibility referral because it believed it needed additional information from another agency, so that bidder did not obtain a review of the nonresponsibility determination, GAO will review the determination.

CONTRACTS**B-219618 Nov. 8, 1985****Negotiation****85-2 CPD 531****Late Proposals or Quotations****Rejection Propriety**

Protest that agency should not have rejected protester's proposal as a late proposal is denied. Where the protester has only offered the commercial courier's receipts (which are either disclaimed by the agency official who allegedly signed them or which appear to have been altered by someone after the agency official signed them) and where other circumstances indicate that the proposal was received late, the protester has failed to carry the burden of affirmatively proving that the proposal was timely submitted.

CONTRACTORS**B-220071 Nov. 8, 1985****Responsibility****85-2 CPD 532****Determination****Review by GAO****Nonresponsibility Finding**

An agency may properly determine a bidder to be nonresponsible and reject a bid based on a finding that the bidder's individual sureties on a bid bond are unacceptable because they failed to disclose outstanding bond obligations on their Affidavits of Individual Surety.

BIDS**B-220199.2 Nov. 8, 1985****Invitation for Bids****85-2 CPD 533****Amendment****Failure to Acknowledge****Bid Nonresponsive**

Where a protester does not allege the existence of limited circumstances under which the protester's failure to acknowledge a solicitation amendment incorporating minimum wage determinations under the Service Contract Act may be corrected, the protester's bid must be viewed as having been properly rejected since such a failure generally renders the bid nonresponsive.

BIDS
Responsiveness
What Constitutes

B-220374 Nov. 8, 1985
85-2 CPD 534 UR

Apparent low bid which took no exception to specifications is not nonresponsive because of a letter the bidder sent to the agency after bid opening indicating an inability to comply with the solicitation's Underwriters Laboratories listing requirement because bid responsiveness is determined as of bid opening and thus letter was relevant only to the issue of bidder responsibility, not responsiveness.

EQUIPMENT
Automated Data Processing
Systems
Acquisition, etc.

B-219508 Nov. 12, 1985
85-2 CPD 535

Competitive Procedures v. Federal Supply Schedule
Utilization

Protest is sustained where, due to procuring activity's failure to synopsize a procurement in the Commerce Business Daily in compliance with regulatory requirements for procuring telecommunications equipment from a General Services Administration nonmandatory Federal Supply Schedule contract, protester was unreasonably excluded from an opportunity to compete.

CONTRACTS
Small Business Concerns
Awards

B-219654 Nov. 12, 1985
85-2 CPD 536

Responsibility Determination
Nonresponsibility Finding
Certificate of Competency on Recent
Procurement--Resubmission to SBA not Required

Where the Small Business Administration (SBA) declines to issue a certificate of competency (COC) on one procurement, and for similar reasons the contracting officer finds the same company nonresponsible on another procurement shortly before SBA's action, the nonresponsibility determination on the other second procurement may be considered to have been in essence ratified by SBA even though there was no referral for COC consideration.

Since section 401 of the Small Business and Federal Procurement Competition Enhancement Act of 1984 prohibits any exemption from the requirement for referral of small business nonresponsibility determinations to the Small Business Administration (SBA), exemption is no longer available for small purchase procedure procurements, so that a nonresponsibility determination thereunder must be referred to SBA for review under the certificate of competency procedures.

Cost evaluation of proposals conducted by an agency under the authority of the Arsenal Statute, 10 U.S.C. § 4532(a) (1982), for the purpose of determining whether supplies can be obtained from government-owned, contractor-operated (GOCO) factories on an economical basis may be made by comparing cost proposals of contractor-owned and -operated plants with out-of-pocket cost proposals of GOCO contractors which exclude those costs that would be incurred by the GOCO contractors whether or not a particular contract is awarded to a GOCO plant.

CONTRACTS**B-220141 Nov. 12, 1985****Protests****85-2 CPD 538****Interested Party Requirement****Protester not in Line for Award**

A protester challenging the government's estimates of the costs to be added to bids for evaluation purposes, in order to equalize the competition between bids for laundry services to be performed in GOCO or COCO facilities, is not an interested party where the protester would not be in line for award even if the bids had been evaluated using the costs the protester contends reflect the government's true costs.

BIDS**B-220174 Nov. 12, 1985****Invitation for Bids****85-2 CPD 539****Specifications****Brand Name or Equal****Salient Characteristics****Conformability Requirement**

Salient characteristics listed in brand name or equal description are presumed to have been regarded as material and essential to the agency's needs.

BIDS**Invitation for Bids****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

In the absence of evidence clearly establishing a substantial adverse impact on competition, GAO will not object to an agency's use of minimum manning or equipment requirements to ensure adequate service.

BIDS**B-220174 Con't****Invitation for Bids****Nov. 12, 1985****Specifications****Restrictive****Burden of Proving Undue Restriction**

Protest that requirement for full-time (versus part-time) workers is unduly restrictive is denied where the agency has supported the requirement and the protester has failed to show that the requirement is improper or clearly unreasonable.

CONTRACTS**Protests****Moot, Academic, etc. Questions****Corrective Action Proposed, Taken, etc. by Agency**

Protest allegations are academic and not for consideration by GAO where agency modifies the challenged solicitation provisions as the protester requests.

CONTRACTS**B-220680.2 Nov. 12, 1985****Protests****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Original decision dismissing a protest as untimely is affirmed where request for reconsideration confirms the fact that the initial protest to the agency, based upon an alleged impropriety in an amendment, was not filed until 11 calendar days after the extended closing date for receipt of proposals.

CONTRACTS B-220717.2 Nov. 12, 1985
Protests 85-2 CPD 540
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Dismissal of protest is affirmed where request for reconsideration does not establish that the decision was based on error of law or fact.

CONTRACTS B-220731.2 Nov. 12, 1985
Protests 85-2 CPD 541
General Accounting Office Procedures
Filing Protest With Agency

Dismissal of original protest for failure to file a copy of the protest with the contracting officer within 1 day after filing with GAO is affirmed where the agency had not received a copy of the protest 2 weeks after the protest was filed with GAO.

Protesters must comply with requirement to furnish a copy of a protest filed with GAO to the contracting agency where a de novo review is requested of a previous agency protest decision.

GENERAL ACCOUNTING OFFICE B-220800.2 Nov. 12, 1985
Jurisdiction 85-2 CPD 542
Labor Stipulations
Wage Determinations

Prior dismissal of protest concerning wage rates included in solicitation is affirmed since GAO does not review wage determinations issued by the Department of Labor, rather, the challenge should be pursued through Labor's administrative review process.

FEDERAL ACQUISITION REGULATION B-220819 Nov. 12, 1985
Proposed Revision

GAO has no objection to a proposal to add paragraph (n) to Federal Acquisition Regulation § 31.205-6 stating that rebates and purchase discounts granted by a government contractor to its employees on products or services produced by the contractor are unallowable.

BIDDERS **B-220905 Nov. 12, 1985**
Invitation Right **85-2 CPD 543**
Failure to Solicit Bids
Cancellation of Invitation not Required

Failure to provide potential bidder, even incumbent contractor, with copy of solicitation does not require resolicitation where protester has not shown that procuring agency deliberately or consciously precluded protester from competing, neglected to seek adequate competition, or failed to obtain reasonable prices.

CONTRACTS **B-218622.4 Nov. 13, 1985**
Negotiation
Offers or Proposals
Preparation
Costs
Denied

GAO affirms prior decision that protester was not entitled to proposal preparation costs since request for proposals (RFP) under which offerors competed was defective such that no award could properly be made. In this circumstance, claim must be denied since legal standard for payment of these costs requires that claimant have a substantial chance of receiving a proper award--a standard which the claimant could not meet under this RFP.

BIDS**B-219448.3 Nov. 13, 1985****Invitation for Bids****85-2 CPD 544****Cancellation****After Bid Opening****Low Bid in Excess of Government Estimate**

Contracting agency's rejection of sole bid on the basis of unreasonable price, resulting in cancellation of the solicitation, was proper when the bid price was significantly higher than the government's estimate and the record discloses no fraud or bad faith on the part of the contracting agency in making its determination.

CONTRACTS**B-219541.2 Nov. 13, 1985****Federal Supply Schedule****Awards****Propriety****Order Limitation Exceeded**

Agency cannot refuse to compete its software requirements on the basis of a determination that its preferred contractor can best meet its needs without first permitting the protester to submit a formal proposal in response to a written solicitation setting forth the government's functional needs.

CONTRACTS**Protests****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Reversal of prior decision is not warranted where request for reconsideration indicates it is based on misinterpretation of that decision. Contrary to the agency's belief, decision did not hold that government may not impose reasonable requirements to assure that offerors propose integrated software design approaches, nor is the agency precluded from acquiring data base management software separately.

CONTRACTS
Negotiation
Awards

B-219601 Nov. 13, 1985
85-2 CPD 546

Not Prejudicial to Other Offerors

Although proposal for portable computers having one hard disk and one floppy disk drive deviated from specification requiring that portable units have at least two floppy disk drives, acceptance of the proposal did not prejudice competing offeror because hard disk drives are generally more expensive to offer and furnish than floppy disk drives and the units proposed did meet agency's actual needs.

CONTRACTS

Protests
Allegations
Unsubstantiated

Protest alleging an offeror's noncompliance with mandatory technical requirements is without merit where the record shows that the successful technical proposal was reasonably evaluated by the agency as meeting the requirements.

CONTRACTS

Protests
General Accounting Office Procedures
Piecemeal Development of Issues by Protester

Where a protester raises a broad ground of protest in its initial submission but fails to provide any detail on this protest ground until it files its conference comments subsequent to its receipt of the agency report, so that a further response from the agency would be needed for an objective review of the matter, the matter will not be considered because protests may not be filed in piecemeal fashion.

CONTRACTS **B-219601 Con't**
Protests **Nov. 13, 1985**
General Accounting Office Procedures
Timeliness of Comments on Agency's Report

Where a protester first raises protest issues in its conference comments that are based on material first revealed by the agency in its report on the protest, GAO will consider these issues as newly filed protests.

BIDDERS **B-219699 Nov. 13, 1985**
Debarment
Labor Stipulation Violations
Davis-Bacon Act
Wage Underpayments
Debarment Required

The Department of Labor recommended debarment of a prime contractor and certain of its officers and controlling employees under the Davis-Bacon Act because of underpayment of wages to its employees and falsification of certified payroll records. Based on our independent review of the record in this matter, we find that there was substantial violation of the Act in that the underpayment of wages was intentional. We conclude that the contractor disregarded its obligations to its employees. Therefore, the contractor and the named individuals will be debarred under the Act.

BIDS **B-219926.2 Nov. 13, 1985**
Invitation for Bids **85-2 CPD 547**
Cancellation
After Bid Opening
Defective Solicitation

Agency has a compelling reason to terminate a protested contract and to cancel the underlying invitation for bids for refrigerated produce cases when specifications are inadequate in not stating that the shelves must be adjustable and removable and when it does not appear that an award to the protester under the original solicitation would meet its needs.

CONTRACTS**B-219926.2 Con't****Protests****Nov. 13, 1985****Moot, Academic, etc. Questions****Contract Terminated for Convenience**

Protest against rejection of a bid as nonresponsive is academic where agency terminates a contract for the convenience of the government because the underlying invitation for bids contains inadequate specifications.

BIDS**B-220034 Nov. 13, 1985****Competitive System****85-2 CPD 548****Preservation of System's Integrity****Pecuniary Disadvantage to Government**

A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the integrity of the competitive bidding system.

BIDS**Mistakes****Correction****Nonresponsive Bids**

A nonresponsive bid may not be corrected through mistake-in-bid procedures.

BIDS**Responsiveness****Exceptions Taken to Invitation Terms**

Bid must be rejected as nonresponsive when cover letter accompanying bid includes standard commercial term disclaiming liability for consequential damages, since it deviates materially from the solicitation.

CONTRACTS **B-220278 Nov. 13, 1985**
Protests **85-2 CPD 549**
Interested Party Requirement
Direct Interest Criterion

Consulting firm which is not a potential bidder is not an interested party under GAO's Bid Protest Procedures.

BIDS **B-220354 Nov. 13, 1985**
Evaluation **85-2 CPD 550**
Discount Provisions
Propriety of Evaluation

The Government Printing Office, whose procurement regulations permit the evaluation of offered prompt payment discounts in evaluating bids, properly reduced a bid offering an eligible prompt payment discount, thereby displacing a lower net bid, where the IFB incorporated by reference a provision that such discounts would be considered.

CONTRACTORS **B-220405 Nov. 13, 1985**
Responsibility **85-2 CPD 551**
Determination
Review by GAO
Affirmative Finding Accepted

GAO does not review affirmative determination of prospective contractor's responsibility absent showing of possible fraud or bad faith on the part of contracting officials or allegation that definitive responsibility criteria in solicitation were misapplied.

CONTRACTS **B-220410 Nov. 13, 1985**
Protests **85-2 CPD 552**
Interested Party Requirement
Suspended, Debarred, etc. Contractors

The General Accounting Office will not consider a protest filed by a debarred contractor because it is not an interested party since it is ineligible to receive an award even if the protest were sustained.

CONTRACTS**B-220463 Nov. 13, 1985****Protests****85-2 CPD 553****Moot, Academic, etc. Questions****Corrective Action Proposed, Taken, etc. by Agency**

Protest by small business firm of agency's failure to submit the matter of protester's responsibility to the Small Business Administration (SBA) for a Certificate of Competency (COC) determination is dismissed as academic because the agency has since referred the matter to the SBA whose determination to issue or not issue the COC is final.

CONTRACTS**B-220560 Nov. 13, 1985****Protests****85-2 CPD 554****General Accounting Office Procedures****Filing Protest With Agency**

Where agency knew the specific aspect of the procurement to which the protester objected in a protest at that level, subsequent protest to GAO will not be dismissed on the basis that the actual agency-level filing was not sufficiently detailed.

CONTRACTS**Small Business Concerns****Awards****Set-Asides****Withdrawal****Propriety**

GAO will not object to a contracting officer's pre-bid-opening decision to withdraw a small business set-aside and issue the solicitation on an unrestricted basis where the record does not show the official abused his discretion in determining that offers from at least two responsible small businesses could not reasonably be expected.

CONTRACTS

B-220672.2 Nov. 13, 1985

Protests

General Accounting Office Procedures

Reconsideration Requests

Error of Fact or Law

Not Established

Information which supplements original grounds of protest, but does not show that decision to dismiss the protest for failure to file a copy of the protest with the contracting officer within 1 day after the protest was filed with GAO is erroneous, is not germane to request for reconsideration of the dismissal.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

Significant Issue Exception

Not for Application

The "good cause" and "significant issue" exceptions in section 21.2(c) of our Bid Protest Regulations apply only to protests which are untimely filed with GAO and not to protests timely filed, but otherwise deficient.

CONTRACTS**B-217848 Nov. 14, 1985****Labor Stipulations****Davis-Bacon Act****Classification of Workmen****Disputes**

Contractor, on project covered by Davis-Bacon Act, requested creation of new wage classification and rate for use on project. In accordance with then existing regulations, after new classification was approved by contracting officer, notice of this new classification was forwarded for informational purposes to Department of Labor (DOL). Classification was disapproved by DOL, and contractor appealed unsuccessfully within DOL. Contractor then appealed to Board of Contract Appeals (BCA) which took jurisdiction under "Disputes Concerning Labor Standards" clause of contract. Decision of BCA held that DOL, under then existing regulations, could not overrule contracting officer's decision on new classification. Under S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972), GAO may not review final BCA decisions rendered under "disputes" clause. Therefore, contractor's use of classification was proper, there were no violations of Davis-Bacon Act, and funds withheld should be returned to contracting officer.

SMALL BUSINESS**B-220387 Nov. 14, 1985****ADMINISTRATION****85-2 CPD 556****Contracts****Contracting With Other Government Agencies****Procurement Under 8(a) Program****Review by GAO**

GAO will not review a contracting agency's decision to satisfy its requirement through a section 8(a) subcontract when a protester, arguing that the agency is acting in bad faith, fails to provide sufficient evidence indicating that agency may be acting in bad faith.

CONTRACTS

B-220619 Nov. 14, 1985

Negotiation

85-2 CPD 557

Offers or Proposals**Evaluation****Administrative Discretion**

In reviewing protests against allegedly improper evaluations, GAO will not substitute its judgment for that of the agency's evaluators, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations. In camera review of source selection documents shows that evaluation was fair and consistent with evaluation scheme in the solicitation.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Price Consideration**

Price need not be considered where a proposal is properly rejected as technically unacceptable.

CONTRACTS

B-220065.2 Nov. 15, 1985

Protests

85-2 CPD 560

Moot, Academic, etc. Questions**Solicitation Canceled**

A protest of the agency's rejection of a proposal is dismissed as academic where the agency canceled the solicitation under which the proposal was submitted.

BIDS **B-220879 Nov. 15, 1985**
Responsiveness **85-2 CPD 561**
Failure to Furnish Something Required
Affiliates Affidavit
Waiver
As Minor Informality

A bidder's failure to furnish with its bid a list of affiliates is a minor informality which may be waived or cured after bid opening. Regardless of solicitation provision to the contrary, the information does not affect bid responsiveness.

CONTRACTS
Awards
Notice
To Unsuccessful Bidders

Although the Federal Acquisition Regulation requires the contracting officer to notify unsuccessful bidders "promptly" of award, it does not specify a particular time. When a protest is without merit, the agency's alleged failure to notify the protester in time so that it can take advantage of statutory "stay" provisions does not prejudice the protester.

BIDDERS **B-220963 Nov. 15, 1985**
Invitation Right **85-2 CPD 562**
Bidder Exclusion not Intended

The award of a contract is not improper merely because a contracting agency failed to solicit a potential bidder where there is no evidence that such failure resulted from a deliberate attempt on the part of the agency to exclude the potential bidder from the competition.

B-220963 Con't

Nov. 15, 1985

Determination

Review by GAO

Affirmative Finding Accepted

GAO does not review affirmative determinations of responsibility except under limited circumstances not present here.

B-219643 Nov. 18, 1985

85-2 CPD 563

Offers or Proposals

Best and Final

Additional Rounds

Denial Propriety

Contracting agency acts reasonably in refusing to reopen discussions with the protester after the receipt of best and final offers, even though the protester's proposal offers an apparent saving of \$4 million, when the best and final introduces numerous deficiencies into a previously acceptable proposal and raises questions concerning the protester's ability to meet solicitation requirements.

CONTRACTS

Negotiation

Offers or Proposals

Best and Final

Discussions

Clarification v. Reopening Negotiations

Although the deficiencies that the protester's best and final offer introduces into its proposal may be largely "informational" in nature, when their number and variety are great, it is not unreasonable for a contracting agency to conclude that they cannot be corrected by means of "clarifications," but require the reopening of discussions.

CONTRACTS

B-219915 Nov. 18, 1985

Negotiation

85-2 CPD 564

Offers or Proposals**Best and Final****Discussions****Clarification v. Reopening Negotiations**

Protest that contracting agency held discussions with eventual awardee after best and final offers is denied where discussions which occurred more than 6 months after agency completed evaluation and recommended award were for the purpose of addressing issues raised in an administrative appeal contesting the agency's selection decision. There is no evidence in the record that proposed awardee was afforded any opportunity to revise its offer.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Reasonable**

Protest alleging that awardee's offer should not have been found acceptable is denied since record establishes reasonable basis for agency's evaluation.

CONTRACTS**Protests****Burden of Proof****On Protester**

The protester has the burden of affirmatively proving bias or favoritism on the part of the procuring agency and where written record fails to demonstrate bias, the protester's allegations are to be regarded as mere speculation.

CONTRACTS**B-219915 Con't****Protests****Nov. 18, 1985****General Accounting Office Procedures****Filing Protest With Agency**

Protester's failure to furnish contracting officer with a copy of its protest to GAO within one day of its filing, as required by Bid Protest Regulations, will not result in the dismissal of the protest where the purpose of this requirement is otherwise satisfied such as where protester filed a copy with the procuring agency's headquarters which notified the contracting officer telephonically of the protest. Furthermore, the agency has not been prejudiced by the delay in receiving a copy of the protest since it filed its report in a timely matter.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Where doubt exists concerning the date the protester became aware of the basis for protest, doubt is resolved in favor of the protester.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest alleging that lease solicitation was defective since it did not provide for adequate parking is dismissed as untimely since protest was not filed until after the closing date for receipt of offers.

CONTRACTS**B-208159.3 Nov. 19, 1985****Protests****Information Evaluation****Sufficiency of Submitted Information**

In response to inquiry concerning GAO policy regarding supplemental submissions in bid protests, letter explains that generally, once the protester's comments on the agency report have been filed, GAO will not consider supplemental submissions from either party, although in appropriate cases, GAO may request or consider supplemental comments.

CONTRACTS**B-219664.2 Nov. 19, 1985****Negotiation****85-2 CPD 565****Late Proposals and Quotations****Contractor's Responsibility for Delivery**

Protester's handcarried proposal which was delivered 45 minutes late because power surges had interrupted its word processing equipment properly was rejected.

CONTRACTS**Negotiation****Late Proposals and Quotations****Rejection Propriety**

A late proposal cannot be considered on the basis that the proposal may offer the government certain advantages over those proposals which have been timely received.

BIDDERS**B-219695 Nov. 19, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Required**

The Department of Labor recommended debarment of a subcontractor and certain of its officers under the Davis-Bacon Act because of underpayment of wages to its employees and falsification of certified payroll records. Based on our independent review of the record in this matter, we find that there was a substantial violation of the Act in that the underpayment of wages was intentional. We conclude that the subcontractor disregarded its obligations to its employees. Therefore, the subcontractor and the named individuals will be debarred under the Act.

CONTRACTS**B-219917 Nov. 19, 1985****Negotiation****85-2 CPD 566****Offers or Proposals****Discussion With all Offerors Requirement****Exceptions****Offers not Within Competitive Range**

Where protester's initial proposal was properly determined to be outside the competitive range, the agency was not obligated to enter into discussions with the protester regarding technical deficiencies in its proposal.

CONTRACTS**B-219917 Con't****Negotiation****Nov. 19, 1985****Offers or Proposals****Evaluation****Competitive Range Exclusion****Reasonableness**

An agency's determination of whether a proposal is in the competitive range is a matter of agency discretion which will not be disturbed absent a clear showing that the determination lacked a reasonable basis or was not consistent with the major evaluation criteria set forth in the request for proposals. Based on the much higher technical evaluation scores of other proposals GAO will not disturb agency's decision to exclude the protester from the competitive range on the basis that it did not have any reasonable chance of being selected for award.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Price Consideration**

Once the protester's proposal was determined to be outside of the competitive range as a result of the technical evaluation of its proposal, the potentially lower price which that offer might provide is irrelevant since an offer not within the competitive range cannot be considered for award.

CONTRACTS**Protests****Burden of Proof****On Protester**

Mere allegations by the protester do not meet its heavy burden of proof that the agency's decision to make award to another offeror was the result of bias or bad faith on the part of the agency.

B-219917 Con't

Nov. 19, 1985

Moot, Academic, etc. Questions

Protest on the basis that agency failed to advise protester of its right to file protest with GAO is dismissed as academic where the protester timely filed a protest with GAO.

B-220142 Nov. 19, 1985

85-2 CPD 567

Offers or Proposals

Evaluation

Competitive Range Exclusion

Reasonableness

Protest against exclusion of proposal from competitive range is denied where record shows agency's finding that offeror's technical proposal was unacceptable was reasonable.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Technical Acceptability

Based on Content of Proposal

A technical evaluation must be based on information contained in the proposal and, consequently, information contained in a preaward survey is not a substitute for information that should have been included in an offeror's technical proposal.

CONTRACTS
Negotiation
Preaward Surveys
Preparation
Costs

B-220142 Con't
Nov. 19, 1985

Protester's claim for costs incurred in participating in preaward survey because protester subsequently was excluded from competitive range is denied where decision to conduct preaward survey has not been shown to be unreasonable. Consistent with customary agency procedure, contracting officer initiated preaward surveys on all offerors before establishing competitive range apparently to avoid possibility of delay in making award because the preaward survey was not completed.

CONTRACTS
Protests
Procedures
Information Disclosure

Protest that contracting agency refused to provide protester with access to certain documents for development of its protest is denied. The contracting agency has the primary responsibility for determining which documents are subject to release under the Competition in Contracting Act of 1984.

CONTRACTS
Protests
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

B-218730.4 Nov. 20, 1985
85-2 CPD 568

To be responsive, bid submitted under total labor surplus area (LSA) set-aside must contain requisite certification that bidder will perform as an LSA. Arguments which are a reiteration of those previously considered in deciding initial protest do not provide basis for reconsideration.

CONTRACTS**B-219575 Nov. 20, 1985****Protests****85-2 CPD 569****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Original decision that protester unreasonably interpreted specification provision and that contracting agency, therefore, properly rejected its bid is affirmed where request for reconsideration does not demonstrate that decision was legally or factually incorrect. Fact that the specification provision was incorrectly punctuated does not mean that the specification was ambiguous.

BIDS**B-219662 Nov. 20, 1985****Invitation for Bids****85-2 CPD 570****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

Department of Energy regulations that implement an energy conservation program and establish uniform testing requirements for washers and dryers utilizing formulas that measure tub capacity in terms of cubic feet do not preclude manufacturers from rating tub capacity in terms of pounds of dry weight. Therefore, specifications for washers and dryers having certain capacities expressed in pounds of dry weight are proper where protester has not shown them to be unreasonable.

BIDS**Invitation for Bids****Specifications****Restrictive**

Solicitation requirement that washers and dryers for use in Air Force dormitories not be over 2 years old is not unduly restrictive where the agency reasonably determines that machines over 2 years old are inoperable more often than newer machines, and that, if machines are inoperable, enlisted personnel may be subject to disciplinary action for failure to meet dress code.

CONTRACTORS **B-219872, et al. Nov. 20, 1985**
Responsibility **85-2 CPD 571**
Determination
Review by GAO
Nonresponsibility Finding

Nonresponsibility determination may be founded on contracting agency's reasonable perception of inadequate prior performance by a contractor even where the contractor disputes the agency's interpretation of the facts.

A contracting agency, lacking any firsthand experience with an offeror, may base its nonresponsibility determination concerning that offeror on a recent preaward survey conducted by another contracting agency.

CONTRACTS
Negotiation
Requests for Proposals
Construction
Reading all Provisions Together Rule
Presumption Against Conflict

Where solicitation defines unit for inspection of custodial services as a thing to be inspected and also defines unit as an area of square meters, tasks which can be measured, such as floor cleaning, would be inspected by area of square meters. In the case of a latrine, the unit is the thing to be inspected and not an area since latrines are not generally described in square meters.

CONTRACTS**B-219872, et al. Con't****Negotiation****Nov. 20, 1985****Requests for Proposals****Specifications****Adequacy****Scope of Work—Sufficiency of Detail**

Where contracting agency provides a general estimate of total floor area to be serviced under custodial services contract based on best information available, it is not required to break down the general estimate into specific estimates of different types of flooring.

CONTRACTS**Protests****Contract Administration****Not for Resolution by GAO**

Implementation of a valid random sampling inspection system is a matter of contract administration which GAO will leave to the reasonable judgment of the contracting agency.

CONTRACTS**Protests****Interested Party Requirement****Nonresponsible Offeror**

A nonresponsible offeror remains an interested party for purposes of a bid protest against alleged solicitation deficiencies if success on the protest may result in cancellation and resolicitation.

**FEDERAL ACQUISITION
REGULATION****B-219923.2 Nov. 20, 1985****Proposed Revision**

GAO has no comments on proposed Federal Acquisition Regulation (FAR) §§ 27.409 and 27.410 and a proposed clause at FAR § 52.227-14 which prescribe procedures for reviewing, challenging and resolving disputes over a government contractor's restrictive markings on technical data required by contract to be delivered to the government.

CONTRACTORS

B-220037 Nov. 20, 1985

Responsibility

85-2 CPD 572

Determination**Review by GAO****Affirmative Finding Accepted**

Allegation that low bidder is affiliated with a debarred corporation constitutes a protest to an affirmative determination of responsibility which our Office will not review in the absence of a showing of fraud or bad faith on the part of contracting officials or a failure to apply definitive criteria of responsibility.

CONTRACTING OFFICERS

B-220152, B-220152.2

Determinations

Nov. 20, 1985

Nonresponsibility

85-2 CPD 573

Administrative v. Judicial Matter**Procedural Due Process Guarantees****Hearing not Required**

Since responsibility determinations are administrative in nature, they do not require the procedural due process otherwise necessary in judicial proceedings, and a contracting officer may base a determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence.

CONTRACTORS**Responsibility****Administrative Determination****Accepted**

Although the protester argues that specific evidence of unsatisfactory performance, financial irresponsibility, and failure to meet solicitation and certification requirements were due to circumstances beyond its control or were otherwise explainable, GAO finds that the contracting officer reasonably concluded otherwise in making a negative responsibility determination.

B-220152; B-220152.2 Con't

Responsibility

Nov. 20, 1985

Determination

Review by GAO

Nonresponsibility Finding

GAO will not question a contracting officer's nonresponsibility determination unless the protester can demonstrate bad faith, abuse of discretion, or a lack of any reasonable basis for the determination.

CONTRACTORS

Responsibility

Determination

Review by GAO

Nonresponsibility Finding

Bad Faith Alleged

Where bad faith is alleged in connection with a contracting officer's nonresponsibility determination, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.

CONTRACTS

B-220545 Nov. 20, 1985

Small Business Concerns

85-2 CPD 575

Awards

Small Business Administration's Authority

Certificate of Competency

Conclusiveness

As a general rule, GAO will not review a contracting officer's determination of a small business bidder's nonresponsibility since the Small Business Administration has statutory authority to determine conclusively whether a small business firm is responsible.

BIDS **B-220570 Nov. 20, 1985**
Invitation for Bids **85-2 CPD 576**
Cancellation
After Bid Opening
Insufficient Funding

Agency properly canceled a solicitation for sealed bids where it determined that sufficient funds were not available to make an award.

CONTRACTS **B-220667.2 Nov. 20, 1985**
Protests **85-2 CPD 577**
Moot, Academic, etc. Questions
Future Procurements

Protest that agency may not conduct a prospective resolicitation properly is premature.

CONTRACTS
Protests
Moot, Academic, etc. Questions
Solicitation Canceled

Protest against award of delivery order is rendered academic by agency's cancellation of delivery order.

CONTRACTS
Protests
Preparation
Costs
Noncompensable

Recovery of the costs of pursuing a protest is inappropriate where the remedy afforded the protester is the opportunity to compete in the procurement.

CONTRACTS **B-220918.2 Nov. 20, 1985**
Protests **85-2 CPD 578**
General Accounting Office Procedures
Timeliness of Protest
Adverse Agency Action Effect
Interim Appeals to Agency--Effect
on 10 Working Day GAO Filing Period

Adverse agency action on a protest filed with the contracting agency, which begins the 10 working day period for filing a subsequent protest with GAO, is any action or inaction that is prejudicial to the protester's position. The fact that a protester continues to pursue its complaint with the contracting agency after such action does not toll the 10-day period.

CONTRACTS **B-221057 Nov. 20, 1985**
Small Business Concerns **85-2 CPD 579**
Awards
Small Business Administration's Authority
Certificate of Competency
Inapplicability of COC Procedures

Protest that contracting agency determined a small business concern's proposal technically unacceptable without referring the matter to the Small Business Administration under its certificate of competency (COC) procedures fails to state a valid basis for protest, since COC procedures do not apply to technical evaluations of proposals.

FEDERAL ACQUISITION **B-216887 Nov. 21, 1985**
REGULATION
Proposed Revision

GAO approves of a proposal to add a sentence to section 9.405(a) of the Federal Acquisition Regulation stating that debarred or suspended contractors are excluded from conducting business with the government as agents or representatives of other contractors.

CONTRACTS **B-218766.2 Nov. 21, 1985**
Protests **85-2 CPD 581**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact of Law
Not Established

Request for reconsideration of prior decision is denied where the request for reconsideration fails to provide any evidence or legal arguments to show that the decision was erroneous.

CONTRACT **B-219428.2; B-219440.2 Nov. 21, 1985**
Protests **85-2 CPD 582**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Requests for reconsideration are denied where protesters raise no new facts or legal arguments which were not previously considered while the initial protests were pending.

CONTRACTS **B-219609 Nov. 21, 1985**
Negotiation **85-2 CPD 583**
Requests for Proposals
Construction
Reading all Provisions Together Rule
Presumption Against Conflict

Protest asserting that the agency misinterpreted the solicitation, and thus evaluated pricing incorrectly, is denied where the solicitation read as a whole and in a manner that gives effect to all its provisions supports the agency's position.

BIDS**B-219733 Nov. 21, 1985****Acceptance or Rejection****85-2 CPD 584****Effect of Acceptance**

When a bidder takes no exception to the requirements of the solicitation in its bid, acceptance of the bid obligates the bidder to perform in accordance with the terms of the solicitation.

BIDS**Responsiveness****Test to Determine****Unqualified Offer to Meet all Solicitation Terms**

Where a bid as submitted does not propose a specific method of performance, the specifications do not require a specific method of performance, and the bid does not otherwise take exception to solicitation requirements, protest challenging rejection of bid as nonresponsive is sustained.

CONTRACTS**B-220000.2 Nov. 21, 1985****Protests****85-2 CPD 585****Basis for Protest Requirement**

Protest that consists primarily of a series of questions about the conduct of the procurement which contain no specific allegations of improper conduct by the agency does not state any adequate legal basis for protest.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

To the extent that a protest letter can be read as raising specific bases for protest, the issues raised are untimely, as the protest was not filed within 10 working days after the bases for protest were known.

BIDS**B-220032 Nov. 21, 1985****Estimates of Government****85-2 CPD 586****Basis of Estimate**

When soliciting for a requirements contract, an agency must base its estimated quantities on the best information available. There is no requirement, however, that these estimates be perfect.

BIDS**Invitation for Bids****Specifications****Adequacy**

Allegations of vague or ambiguous solicitation provisions are rejected where requirements are stated clearly and those allegations are based on an unreasonable interpretation of the solicitation.

BIDS**Invitation for Bids****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

Contracting agency has the primary responsibility for determining its minimum needs and drafting requirements that reflect those needs. We will not question an agency's assessment of its minimum needs where a protester fails to show that the agency's determination is unreasonable.

BIDS**B-220424 Nov. 21, 1985****Responsiveness****85-2 CPD 587****Failure to Furnish Something Required****Standard Representations and Certifications****Waiver****As Minor Informality**

Failure to complete nonmaterial representations and certifications in a bid does not render the bid nonresponsive.

**FEDERAL ACQUISITION
REGULATION**

B-220943 Nov. 21, 1985

Proposed Revision

GAO has no objection to the proposed addition of Federal Acquisition Regulation (FAR) § 31.205-19(a)(5) to the FAR's contract cost principles which would state that premiums for retroactive or backdated insurance written to cover occurred and known losses are unallowable.

BIDDERS

B-218999 Nov. 22, 1985

Debarment

Labor Stipulation Violations

Davis-Bacon Act

Wage Underpayments

Debarment Required

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay the minimum wages required by the Act and has falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligation to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional. Therefore, the contractor will be debarred under the Act.

CONTRACTS

B-220080.2 Nov. 22, 1985

Protests

85-2 CPD 589

General Accounting Office Procedures

Reconsideration Requests

Error of Fact or Law

Not Established

Prior decision is affirmed on reconsideration since protester has not shown any errors of law or fact which warrant reversal of that decision.

BIDS

B-220162 Nov. 22, 1985

Competitive System

85-2 CPD 591

Preservation of System's Integrity**Pecuniary Disadvantage to Government**

A nonresponsive bid may not be accepted, notwithstanding any savings it might represent to the government, since such acceptance would compromise the integrity of the competitive bidding system.

BIDS**Responsiveness****Exceptions Taken to Invitation Terms**

A bid that takes exception to the packaging specifications of a solicitation is nonresponsive, since, in order to be considered responsive, a bid must be an unequivocal offer to provide the exact thing described in the invitation for bids, in total conformance with the material terms of the solicitation.

A bid that includes preprinted terms and conditions that vary from the terms and conditions in the solicitation is nonresponsive.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Under GAO Bid Protest Regulations, a protest based upon improprieties in the terms of an invitation for bids apparent on the face of the invitation must be filed prior to bid opening.

CONTRACTS **B-220253 Nov. 22, 1985**
Federal Supply Schedule 85-2 CPD 592
To Other Than Low Bidder or Offeror
Justification

Protest against the issuance of a delivery order to higher priced Federal Supply Schedule (FSS) contractor by protester with similar FSS contract is denied where the agency reasonably determined that awardee met agency's needs and protester did not.

CONTRACTS
Protests
Abandoned

Where agency rebuts an issue raised in the initial protest and the protester fails to respond to the agency's rebuttal in its comments to the agency report, the issue is deemed abandoned.

BIDS **B-220434.2 Nov. 22, 1985**
Responsiveness 85-2 CPD 593
Brand Name or Equal Procurement

When the solicitation in a "brand name or equal" procurement requires that the bid specify the model number of the item to be supplied, the bidder may not be permitted to supply the model number after bid opening since that would give the bidder the opportunity to make a nonresponsive bid responsive.

CONTRACTORS **B-220683 Nov. 22, 1985**
Responsibility
Determination
Definitive Responsibility Criteria
Compliance

As a matter of information to a member of Congress whose constituent's protest would be untimely under the Bid Protest Regulations, GAO concludes that the Air Force acted properly in making award to a firm whose product has not received FDA approval, since this is a matter of responsibility and therefore the required authorization need only be obtained prior to the scheduled start of performance.

CONTRACTS**B-219423.2 Nov. 25, 1985****Negotiation****85-2 CPD 594****Determinations and Findings****Basis for Negotiation**

Although the Commandant of the Coast Guard was not statutorily empowered at the time to execute the Determination and Findings (D&F) authorizing the negotiation of a vessel modernization procurement, GAO finds no legal error in its conclusion that the D&F may properly be reexecuted now by the Secretary of Transportation if she agrees that the procurement should have been negotiated originally.

CONTRACTS**Protests****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

In order to prevail in a request for reconsideration of a prior decision, the requesting party must convincingly show either errors of fact or of law in the prior decision which warrant its reversal or modification.

CONTRACTS**B-220012 Nov. 25, 1985****Data, Rights, etc.****85-2 CPD 595****Disclosure****Prior to Award****No Evidence to Support Allegation**

GAO will not recommend award to the protester rather than the low responsive bidder where the protester does not present clear and convincing evidence that the solicitation's specifications and drawings package is derived from proprietary technical data and drawings.

B-220092, et al. Nov. 25, 1985

Negotiation

85-2 CPD 596

85-2 CPD 596

Requests for Proposals

Specifications

Minimum Needs

Not Overstated

Allegation that solicitation does not represent agency's minimum needs is denied where protester fails to establish that agency determination of its needs was unreasonable.

CONTRACTS

Negotiation

Requests for Proposals

Specifications

Restrictive

Undue Restriction not Established

Protest that specifications for vibration analysis equipment are unduly restrictive is denied where restrictions imposed are reasonably related to the agency's actual needs.

CONTRACTS

Negotiation

Sole-Source Basis

Administrative Determination

Reasonable Basis

Sole-source awards based on safety considerations and urgency to satisfy agency's interim requirement pending the completion of competitive acquisition are not unreasonable where awardees are the only firms capable of supplying the equipment within the required timeframe.

CONTRACTS **B-220146.2 Nov. 25, 1985**
Protests **85-2 CPD 597**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Under Bid Protest Regulations, protest based on information provided to protester at debriefing must be filed within 10 working days of the debriefing. Protester's apparent belief that agency had agreed after debriefing to permit protester to file a detailed protest within 30 days after receiving information requested under the Freedom of Information Act does not excuse the protester from compliance with GAO bid protest timeliness requirements. Bid Protest Regulations provide objective criteria to be applied to all protests filed with GAO and may not be waived by actions or representations of a contracting officer.

BIDS **B-220200 Nov. 25, 1985**
Invitation for Bids **85-2 CPD 598**
Amendments
Failure to Acknowledge
Bid Nonresponsive

A bid that fails to acknowledge an amendment which reduced the contract delivery period is nonresponsive, and the deficiency may not be waived on the basis that the bidder did not receive the amendment where the bidder fails to show that, as it contends, the agency deliberately failed to provide a copy of the amendment and otherwise consciously acted to exclude the bidder from competing.

CONTRACTS **B-218021.3 Nov. 26, 1985**
Protests **85-2 CPD 599**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior decision is affirmed where no new facts or legal arguments are raised which show that prior decision was erroneous.

CONTRACTS**B-219435.2 Nov. 26, 1985****Negotiation****85-2 CPD 600****Requests for Proposals****Construction****Reasonable Interpretation**

Where a company protesting award to another offeror has a fundamental disagreement with the contracting agency about the meaning of certain specifications, and the agency's interpretation is not unreasonable, protest that the agency incorrectly found that the awardee's proposal met those specifications is denied.

CONTRACTS**Protests****Allegations****Unsubstantiated**

Protest that awardee's offered equipment failed to comply with mandatory solicitation specifications is denied where the awardee's proposal indicated that the offered equipment complied with the requirements and there was nothing in the proposal, or in the protest record, to establish otherwise.

BIDS**B-219651 Nov. 26, 1985****Mistakes****85-2 CPD 601****Contracting Officer's Error Detection Duty**

Although applicable regulations require a contracting officer to examine all bids for error and to obtain verification where a mistake is suspected, there is no reason to do so when a bid is only 2 percent more than the next-low bid and 12 percent less than the government estimate.

BIDS**B-219651 Con't****Mistakes****Nov. 26, 1985****Contracting Officer's Error Detection Duty
Notice of Error**

Discrepancy between the stated total of a number of items and the correct mathematical total of those items does not constitute constructive notice of a mistake requiring the contracting officer to obtain verification of a bid. Unless there was a duty to verify, a post-award mistake claimed by other than an awardee may not be corrected, since the sole responsibility for the preparation of a bid rests with the bidder, who must bear the consequences of its mistake unless the contracting officer has actual or constructive notice of an error before award.

CONTRACTS**Offer and Acceptance****Oral****Written Confirmation**

When Department of Energy has approved a managing contractor's procurement procedures, and these specifically state that notice of award may be made by telephone, oral award is valid. In these circumstances, the parties intend to make a binding agreement at the time the oral notice is given, and written notice merely confirms the award.

CONTRACTS**Protests****Basis for Protest Requirement**

When protest is otherwise without legal merit, GAO does not reach the question of whether a subcontract awarded by a Department of Energy construction management contractor is subject to the Competition in Contracting Act of 1984, so that, as protester alleges, continued performance violates the stay provisions of the Act.

CONTRACTS B-219651 Con't
Small Business Concerns Nov. 26, 1985
Awards
Prior to Resolution of Size Protest

Although in a small business set-aside the contracting officer generally is required to notify unsuccessful offerors, before award, of the name and location of the successful offeror, providing an opportunity to file a timely, i.e., pre-award, size status challenge, notice is not required when the contracting officer determines that award must be made without delay. In such a case, the size status determination will apply only prospectively.

CONTRACTS
Small Business Concerns
Awards
Small Business Administration's Authority
Size Determination

Only the Small Business Administration (SBA) has authority to determine whether a firm is "small." Further, size status concerns the bidder's eligibility for SBA programs and for federal procurement purposes; it does not affect the bidder's responsibility or the responsiveness of its bid.

CONTRACTS
Subcontracts
Competition
Applicability of Federal Norm
Procurements "for" Government

Federal procurement statutes and regulations do not apply per se to a construction management contractor operating by and for the Department of Energy; rather, such a prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency-approved procedures. GAO review is to determine whether the procurement conforms to the federal norm, i.e., the policy objectives in the federal statutes and regulations.

CONTRACTS

B-219683 Nov. 26, 1985

Negotiation

85-2 CPD 602

Competition

Equality of Competition

Incumbent Contractor's Advantage

The government is not required to equalize the competitive advantage of competing concerns where such advantage is based on incumbency and experience, and not the result of preference or unfair action by the government.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Cost Realism Analysis

Adequacy

GAO will not object to cost realism determination where agency calculated adjusted cost estimates by comparing each offeror's proposed costs to agency cost estimates for several sample work items, and relied generally on the quality of each offeror's support data to substantiate the offeror's cost estimate.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Price Consideration

Where solicitation for work provided that option work would be evaluated for award, fact that protester, which did not submit low overall cost, allegedly submitted lower price for base period work is not significant.

CONTRACTS **B-219683 Con't**
Protests **Nov. 26, 1985**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protest based on information which protester admits was known from debriefing filed more than 10 working days after debriefing is untimely.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Debriefing Conferences
Issues Providing Protest Basis

Protest against cost evaluation of proposals is timely filed approximately 1 month after debriefing where record indicates that basic pricing information giving rise to protest was not given to protester at debriefing and record shows protester pursued diligently information underlying protest and filed protest within 10 working days after receipt of information.

BIDS **B-219763.2 Nov. 26, 1985**
Invitation for Bids **85-2 CPD 603**
Clauses
Inspection of Services
Price Reduction v. Reperformance Provisions
Reconcilability

A provision in a solicitation for custodial services that permits the government to deduct from the contractor's payments for unperformed or unsatisfactory services does not conflict with any reperformance rights of the contractor. Both the standard "inspection of services" clause and the solicitation itself permit, but do not require, the government to allow the contractor to reperform.

BIDS**Invitation for Bids****Clauses****Liquidated Damages****Legality****B-219763.2 Con't****Nov. 26, 1985**

Protest against a provision in a solicitation for custodial services that permits the government to deduct from the contractor's payments an amount representing the value of unsatisfactory service is denied when protester provides no explanation of its objection to the provision and does not demonstrate the unreasonableness of the provision.

CONTRACTS**Protests****Basis for Protest Requirement**

Protest alleging that work tasks and reperformance rights provisions of solicitation are ambiguous does not state a basis of protest when the protester provides no examples of the alleged ambiguities and does not demonstrate that any of the provisions are susceptible to more than one reasonable interpretation.

CONTRACTS**Protests****Contract Administration****Not for Resolution by GAO**

The actual implementation of a payment deduction system for deficient performance of services is a matter of contract administration, not for GAO's review.

CONTRACTS**B-220070 Nov. 26, 1985****Protests****85-2 CPD 604****General Accounting Office Procedures****Timeliness of Protest****Adverse Agency Action Effect****Solicitation Improprieties**

Protest of alleged solicitation defects is untimely where the firm initially protested to the contracting agency prior to the closing date for receipt of proposals, but did not protest to GAO within 10 working days of closing. Where the agency does not take corrective action requested regarding solicitation defects, closing constitutes the initial adverse action on an agency-level protest.

CONTRACTS**B-220132 Nov. 26, 1985****Federal Supply Schedule****85-2 CPD 605****Multiple Suppliers****Agency Issuance of a Request for Quotations****Evaluation Propriety**

Where it is necessary, an agency properly may obtain additional technical information from a Federal Supply Schedule offeror beyond what the offeror furnishes along with its response to the agency's request for schedule price quotation.

CONTRACTS**Federal Supply Schedule****Purchases for System****Multiple-Award Schedule Contracts****Minimum Needs Requirement****Administrative Determination**

GAO will not object to an agency's determination that an offered product does not meet its minimum needs unless the determination is unreasonable. Where the protester's descriptive literature submitted with its price quotes shows that the product it is offering does not meet the agency's stated salient requirements, the agency properly may reject the protester's quotes. Moreover, the offeror's blanket statement of compliance with all requirements does not make the offer acceptable.

CONTRACTS **B-220132 Con't**
Requests for Quotations **Nov. 26, 1985**
Specifications
Brand Name or Equal
"Equal" Product Evaluation

When a design feature, such as size or weight, is specified as a salient characteristic, a product offered as being equal to a stated brand name must meet that characteristic precisely.

Protester's offered product should not have been rejected for failing to meet a certain salient feature where the offered product of the awardee also did not meet this feature. However, rejection for this reason did not prejudice protester, and thus is not cause for disturbing the award, since protester's offered product was rejected for other valid reasons.

CONTRACTS **B-220144 Nov. 26, 1985**
Federal Supply Schedule **85-2 CPD 606**
Purchases for System
Multiple-Award Schedule Contracts
Minimum Needs Requirement
Administrative Determination

Protest against the issuance of a delivery order for printing equipment to multiple-award Federal Supply Schedule contractor by protester with similar schedule contract is denied where the agency reasonably determined that only on-line equipment would meet its requirement, after the protester demonstrated its equipment, which was not on-line.

CONTRACTS **B-220517.2 Nov. 26, 1985**
Protests **85-2 CPD 607**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior dismissal of untimely protest is affirmed where protester fails to show the dismissal was based on any errors of fact or law.

CONTRACTS

B-220559.2 Nov. 26, 1985

Protests

85-2 CPD 608

General Accounting Office Procedures**Reconsideration Requests****Error of Fact of Law****Not Established**

Prior dismissal of a protest as academic due to the agency's cancellation of the challenged solicitation is affirmed since the protester's mere speculation as to the agency's future course of action in satisfying the requirement is not a valid reason for GAO to consider the merits of the protest.

CONTRACTS**Protests****Moot, Academic, etc. Questions****Solicitation Canceled**

Where GAO's bid protest authority over objections to solicitation provisions is limited to matters that concern a proposed contract for the procurement of property or services, GAO is not the proper forum to consider the agency's alleged misuse of the protester's proprietary information since the challenged solicitation has been canceled and, hence, there is no longer a proposed contract in issue.

BIDDERS**B-217810 Nov. 27, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor (DOL) recommended debarment of a contractor under the Davis-Bacon Act (Act) because the contractor had falsified certified payroll records, and failed to pay its employees the appropriate rates of compensation. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional and the certified payrolls were falsified. Therefore, the contractor will be debarred under the Act.

CONTRACTS**Labor Stipulations****Davis-Bacon Act****Wage Underpayments**

Pursuant to § 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1982), workers have a statutory entitlement to certain wage rates which are not subject to contractual modifications, and indeed which are not waivable by the workers. Even if the workers here did attempt to waive their statutory entitlements, the contractor is still liable for their full payment. Thus, the contractor's argument that the employees agreed to such contractual modifications of their wage rates constitutes no defense to violating the Davis-Bacon Act.

CONTRACTS**B-218427.3 Nov. 27, 1985****Negotiation****85-2 CPD 609****Requests for Proposals****Construction****One Reasonable Interpretation**

Protest against award to firm that offered tugboats that were not classed at time of initial proposal submission is denied where the only reasonable reading of the RFP's classification requirement was that classed tugs had to be used to perform the work and that tugs thus did not have to be classed until time of delivery.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Freedom of Information Act Request Involvement**

Where protester files Freedom of Information Act request promptly after learning of award and there is no showing that agency-level protest then was not filed within 10 days after protester received the information on which its protest was founded, protest was timely filed. Fact that information might have been available from another source more quickly does not render protest untimely.

CONTRACTS**B-219623.2 Nov. 27, 1985****Protests****85-2 CPD 610****Preparation****Costs****Noncompensable**

Claim for attorney's fees is denied where agency, in response to protest, refers nonresponsibility determination to Small Business Administration so that protester in fact is not being unreasonably excluded from the competition.

BIDS

B-219981 Nov. 27, 1985

Mistakes

85-2 CPD 611

Correction**Intended Bid Price****Establishment Required**

Contracting agency improperly permitted awardee to correct mistake in its bid as a clerical mistake since the unit price and extended price were in agreement and intended bid therefore could not be determined from the face of the bid.

BIDS**Mistakes****Intended Bid Price Uncertainty****Bid Withdrawal**

Withdrawal of bid, not correction of mistake in bid, was the appropriate remedy where the only evidence of the intended bid was the bidder's price sheet, which lacked any indication of how price was calculated; the amount of the error in price was substantial; and corrected bid was close in amount to the second low bid.

CONTRACTS**Protests****Interested Party Requirement****Direct Interest Criterion**

Protester, the second low bidder, has the direct economic interest necessary to be an interested party entitled to challenge the contracting agency's decision to allow the low bidder to correct an apparent mistake in its bid since, if the protest were sustained, the low bidder's bid would have to be withdrawn and the protester thus would be in line for award.

CONTRACTS B-220618.2 Nov. 27, 1985
Protests 85-2 CPD 612
General Accounting Office Procedures
Reconsideration Requests
Additional Evidence Submitted
Available but not Previously Provided to GAO

GAO affirms prior dismissal of protest, which appeared untimely on its face, where protester did not present in its protest the relevant available facts establishing the timeliness of its protest.

BIDS B-220663; B-220664 Nov. 27, 1985
Late 85-2 CPD 613
Hand Carried Delay
Commercial Carrier
Failure to Deliver to Designated Office

Bids delivered by commercial carrier are considered to be hand-carried. Protest is denied where bidder's failure to address its bid package to the hand-carried address is the paramount cause of late receipt; therefore, bids were properly rejected as late.

FEDERAL ACQUISITION B-205208 Nov. 29, 1985
REGULATION
Proposed Revision

GAO has no objection to proposed changes to Federal Acquisition Regulation (FAR) contract clauses found at FAR §§ 52.230-3(a)(5) and 52.230-5(a)(4) implementing section 934 of the Department of Defense Authorization Act, 1986, Pub. L. 99-145, which states that the interest rate to be charged a government contractor for failure to comply with Cost Accounting Standards or to follow cost accounting practices consistently shall be the rate established by the Secretary of the Treasury under Pub. L. 92-41.

CONTRACTS**B-218102.5 Nov. 29, 1985****Protests****85-2 CPD 614****Contract Administration****Not for Resolution by GAO**

GAO will not review whether an awardee is actually complying with specification requirements during the performance of its contract because that is a matter of contract administration.

BIDS**B-219825 Nov. 29, 1985****Responsiveness****85-2 CPD 615****Failure to Furnish Something Required****Itemized Buy American Act Information**

Bidder's failure to state tariff for foreign end product as required by invitation may be waived as a minor informality where the only use of the tariff is to provide an evaluation preference for domestic end products and end products of certain qualifying countries, and all bidders offered end products from the same country.

CONTRACTS**B-220168.2 Nov. 29, 1985****Protests****85-2 CPD 620****Interested Party Requirement****Suspended, Debarred, etc. Contractors**

GAO will not consider protest that agency improperly canceled solicitation, because protester has been suspended from government contracting and is ineligible to receive a government contract and therefore is not an interested party to protest under Bid Protest Regulations.

BIDS**B-220209 Nov. 29, 1985****Responsiveness****85-2 CPD 616****Failure to Furnish Something Required****Technical Information**

A bidder's failure to specify in its bid the type of retaining wall it intended to build for a road construction project may be waived as a minor informality where the requirement to specify the wall type was inadvertently included in the IFB and the bidder gained no competitive advantage over bidders who furnished the information.

TRANSPORTATION LAW

TRANSPORTATION

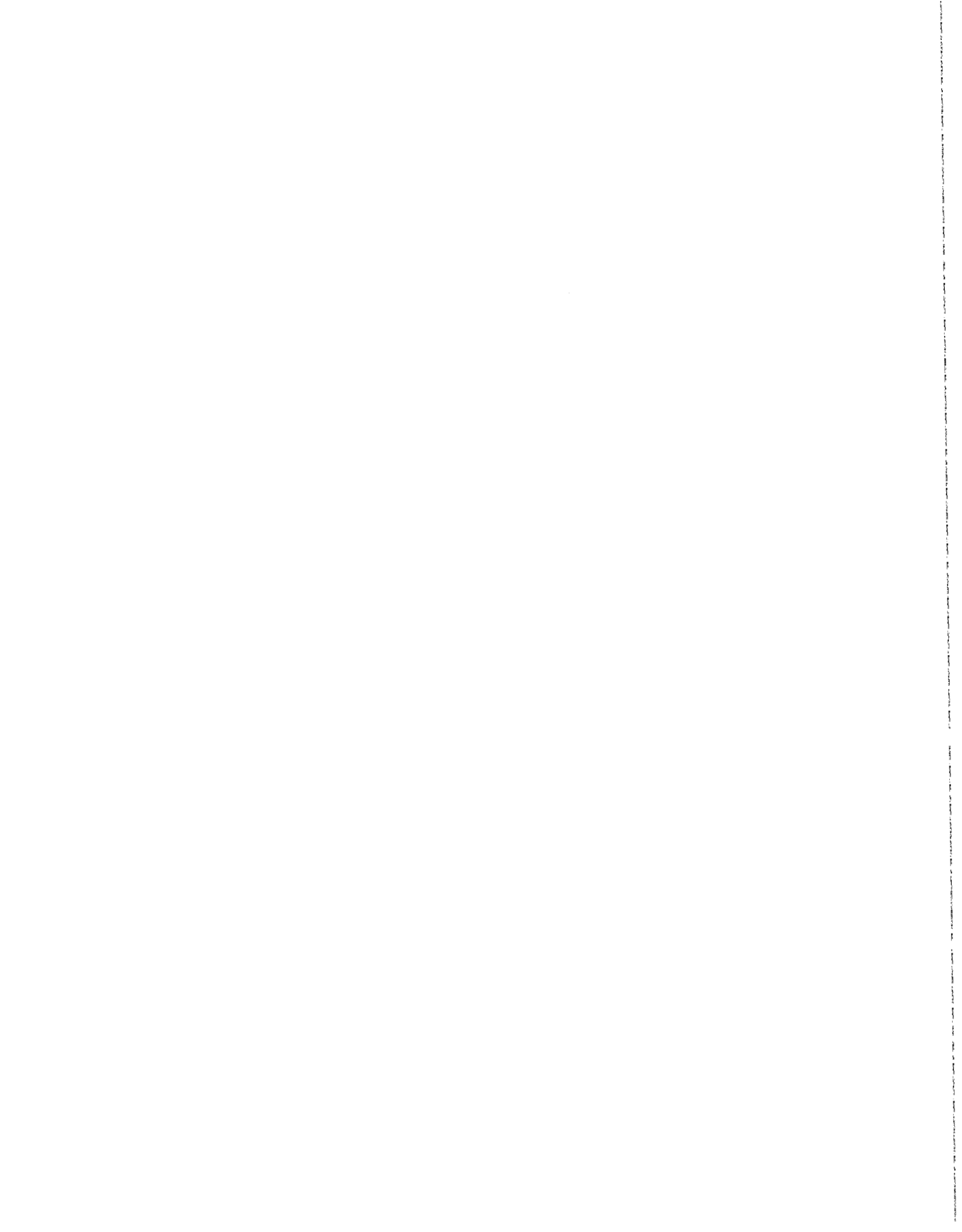
B-218694 Nov. 25, 1985

Rates

Tariffs

Tariff v. Section 22 Quotations

For the transportation of a Government shipment to Tobyhanna Army Depot, Pennsylvania, a motor common carrier collected charges based on tariff rates. The General Services Administration (GSA) determined that lower tender rates offered solely to the Government under section 22 of the Interstate Commerce Act, 49 U.S.C. § 10721, were applicable, and collected the overcharges by deduction. The GSA action was improper. Although the carrier had nationwide operating authority to transport Government traffic between all points in the United States, the statutory authority to offer the Government lower rates is voluntary. The carrier's tender refers to a certificate of public convenience and necessity and a points-of-service tariff that exclude Tobyhanna as a direct service point; thus, the rates in the tender are not applicable to traffic transported to that point.



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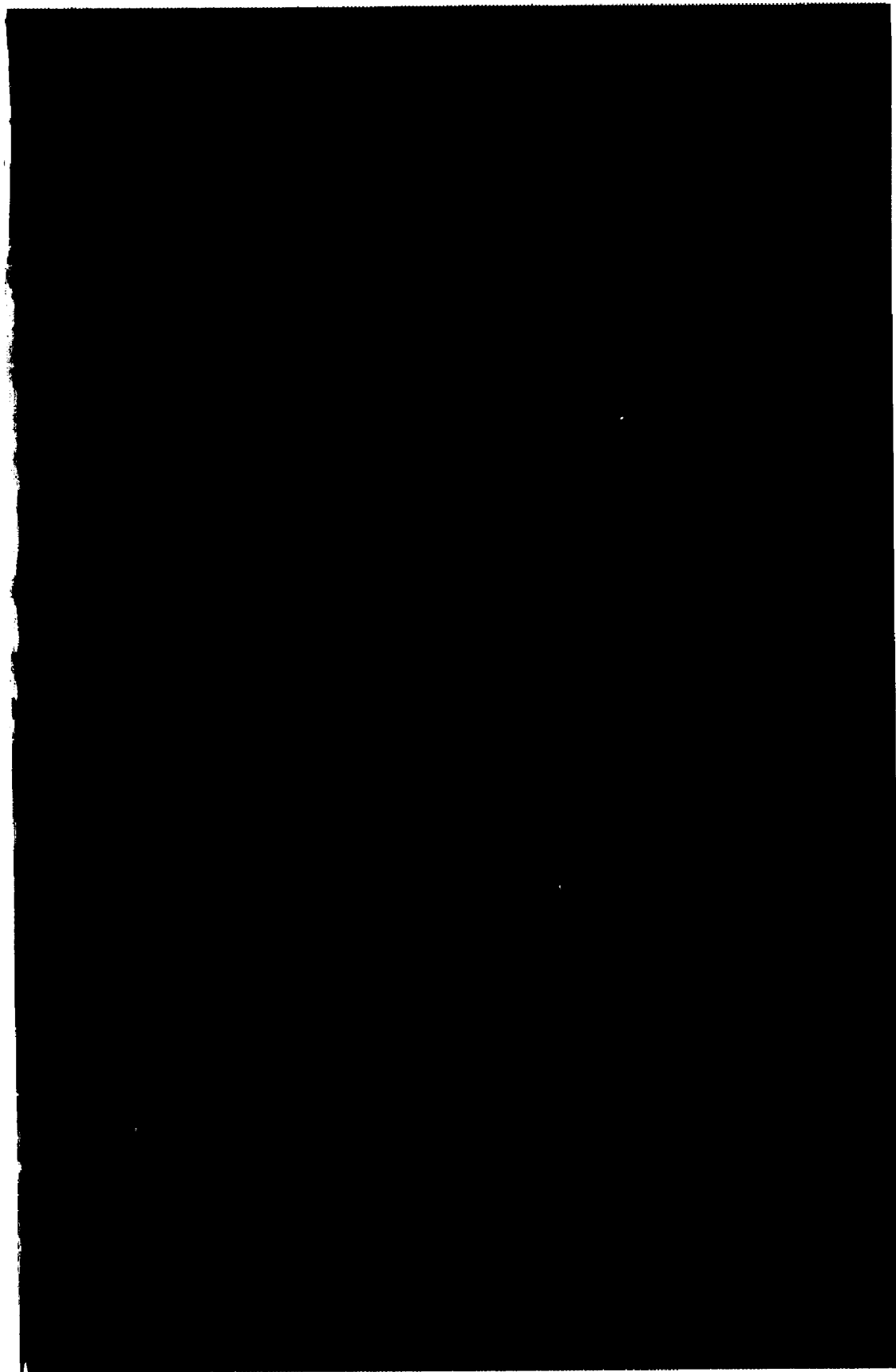
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